

# EXHIBIT 41

30(b)(6) Arkansas Dept of HS - Vol. I

December 10, 2008

Little Rock, A

Page 1

## UNITED STATES DISTRICT COURT

## DISTRICT OF MASSACHUSETTS

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In re: PHARMACEUTICAL INDUSTRY )

AVERAGE WHOLESALE PRICE )

LITIGATION )

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United States of America ex rel.) MDL No. 1456

Ven-A-Care of the Florida Keys, )

Inc. v. Abbott Laboratories, ) Civil Action

Inc., Civil Action No. 06- ) No. 01-12257-PBS

11337-PBS; and United States of )

America ex rel. Ven-A-Care of ) Honorable

the Florida Keys, Inc., v. Dey, ) Patti B. Saris

Inc., et al., Civil Action No. )

05-11084-PBS; and United States )

of America ex rel. Ven-A-Care )

of the Florida Keys, Inc., v. )

Boehringer Ingelheim Corp., et )

al., Civil Action No. 07-10248- )

PBS )

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## Little Rock, A

<p style="text-align: right;">Page 50</p> <p>1 A. Yes.</p> <p>2 Q. What prompted the department to make</p> <p>3 this change to the reimbursement formula?</p> <p>4 A. That's -- I was basically a little bit</p> <p>5 more -- got a little bit more involved here at</p> <p>6 this point. But basically, Mr. Hanley just knew</p> <p>7 that one of the other states was doing this and</p> <p>8 wanted to see if we could -- could try it. So we</p> <p>9 attempted it, basically. I mean, that's it in a</p> <p>10 nutshell.</p> <p>11 Q. Did -- you had mentioned before that</p> <p>12 Arkansas often does surveys --</p> <p>13 A. Uh-huh.</p> <p>14 Q. -- or hires Myers &amp; Stauffer --</p> <p>15 A. Uh-huh.</p> <p>16 Q. -- to do surveys before they change the</p> <p>17 dispensing fee. Was there any survey that</p> <p>18 supported going to the increased discount off of</p> <p>19 AWP for chains?</p> <p>20 A. We didn't have a specific survey to</p> <p>21 support this. We used another state survey to</p> <p>22 support this, from what I remember. I don't</p>	<p style="text-align: right;">Page 52</p> <p>1 implemented it, and then we knew that Wal-Mart</p> <p>2 and Walgreens were going to file a lawsuit. So I</p> <p>3 don't know if there was an agreement to just pull</p> <p>4 it back, but we -- we terminated it at that point</p> <p>5 in time. But I just -- I don't know every little</p> <p>6 piece that transpired to -- to cause us to pull</p> <p>7 it, but due to upcoming litigation, we withdrew.</p> <p>8 Q. And -- and did -- did Wal-Mart and</p> <p>9 Walgreens actually sue the State over this?</p> <p>10 A. That's correct. Now -- I don't know</p> <p>11 that they sued. They filed litigation. I don't</p> <p>12 know. I don't know how to answer that. I don't</p> <p>13 know if it was law -- it was a lawsuit.</p> <p>14 Q. All right. And do you know what the</p> <p>15 end result of the litigation was?</p> <p>16 A. Well, we were not allowed to pursue the</p> <p>17 AWP minus 17 percent on chains. I -- yes, they</p> <p>18 did file a lawsuit. I guess my thought of</p> <p>19 lawsuit, I was thinking of financial lawsuit, but</p> <p>20 yes, they pursued a lawsuit, and we lost. Sorry</p> <p>21 about that.</p> <p>22 MS. OBEREMBT: I think this is a good</p>
<p style="text-align: right;">Page 51</p> <p>1 remember that we specifically had a Myers &amp;</p> <p>2 Stauffer survey at this time. I don't recall</p> <p>3 that, if we did.</p> <p>4 Q. And what was the goal here of the State</p> <p>5 in making this change to the reimbursement</p> <p>6 formula?</p> <p>7 A. Well, in essence, we felt and Mr.</p> <p>8 Hanley, from what I recall, felt fairly certain</p> <p>9 that the chain reimbursement -- that the chains</p> <p>10 could purchase at a much better price than the</p> <p>11 independents, and so the purpose was to get up</p> <p>12 closer to the actual -- what that pharmacy was</p> <p>13 actually paying for the drug for a chain. So</p> <p>14 that was his intent.</p> <p>15 Q. And then I notice here that the -- this</p> <p>16 reimbursement formula was only in effect for</p> <p>17 approximately nine days?</p> <p>18 A. Uh-huh.</p> <p>19 Q. Nine or ten days. What happened?</p> <p>20 A. A lot was going on at that time. So</p> <p>21 what I can recall is CMS approved it. I have to</p> <p>22 assume that the legislature approved it. We</p>	<p style="text-align: right;">Page 53</p> <p>1 time for a break. We're about at the end of our</p> <p>2 tape, so why don't we go off the record.</p> <p>3 VIDEOGRAPHER: Going off record at</p> <p>4 10:07 a.m, ending Tape 1.</p> <p>5 (Whereupon, a break was taken.)</p> <p>6 VIDEOGRAPHER: Back on record at 10:16</p> <p>7 a.m.</p> <p>8 MS. OBEREMBT: I'd like to mark as</p> <p>9 Exhibit 10 a series of pages from Arkansas State</p> <p>10 Plan Amendment 2000-02, and the Bates numbers are</p> <p>11 ARK3057 to 3067.</p> <p>12 [Marked Exhibit Bridges 010]</p> <p>13 Q. (By Ms. Oberembt) Does Exhibit 10</p> <p>14 appear to be a series of pages from Arkansas</p> <p>15 State Plan Amendment 2000-02 dealing with</p> <p>16 pharmaceutical reimbursement?</p> <p>17 A. Yes, it does.</p> <p>18 Q. And does the State Plan Amendment here</p> <p>19 appear to be consistent with the reimbursement</p> <p>20 formula listed for the time period May 8th, 2000</p> <p>21 through February 28, 2002 on the summary chart</p> <p>22 that's Exhibit 3?</p>

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<p style="text-align: right;">Page 62</p> <p>1 Q. (By Ms. Oberembt) Does this appear to 2 be a document issued by DHS? 3 A. Yes, ma'am. 4 Q. Does it appear it be another update to 5 the pharmacy provider manual? 6 A. Let me look carefully. It looks like a 7 combination. What it appears to me to be would 8 be a manual update that was going -- going to the 9 legislature for rules and regs, yes. 10 Q. And if you would turn to Bates Page 11 795. 12 A. Uh-huh. 13 Q. Does the formula reflected there, is 14 that consistent with the formula on Exhibit 3 15 from March 1st, 2002 to the present? 16 A. That's its intent, yes, ma'am. 17 Q. I'm going to ask you to turn back, if 18 you could, to Exhibit No. 2, which was the 19 federal regulation. 20 A. Okay. 21 Q. Could you turn to Page 2 of Exhibit 2, 22 Section 447.332, entitled "Upper Limits for</p>	<p style="text-align: right;">Page 64</p> <p>1 purposes? 2 A. Well, the AWP is the benchmark that we 3 use for the reimbursement. I mean, that's 4 basically what it is, is a benchmark. And that's 5 why we have to use the AWP minus a percent to -- 6 as our best estimate for what the AWP 7 reimbursement would be, just, basically, a 8 benchmark. 9 Q. And what is -- what is DHS's 10 understanding of where FDB obtains its AWP? 11 A. It's the State's understanding that 12 they are supplied to First DataBank from the 13 manufacturer. 14 Q. Does Arkansas' current reimbursement 15 scheme represent its best estimate of estimated 16 acquisition costs? 17 A. Yes, ma'am. 18 Q. Does the State set maximum allowable 19 cost for certain drugs? 20 A. We do. 21 Q. What is a "maximum allowable cost"? 22 A. A maximum allowable cost is the maximum</p>
<p style="text-align: right;">Page 63</p> <p>1 Multiple Source Drugs"? Is that what you 2 understand to be the federal upper limit? 3 A. Yes, ma'am. 4 Q. And what is the "federal upper limit"? 5 A. The federal upper limit is a maximum 6 allowable cost that's applied to generically 7 equivalent brands and generics. 8 Q. Does the State set that amount? 9 A. Not on the federal upper limits, no. 10 Q. Who sets the federal upper limits? 11 A. CMS. 12 Q. We've looked at the State of Arkansas' 13 reimbursement formula since 1990. Does -- has 14 the state consistently defined EAC with reference 15 to AWP? 16 A. Yes. 17 Q. Have you seen the State define AWP as 18 anything other than the -- the plain meaning of 19 the words, average wholesale price? 20 A. No, ma'am. 21 Q. What was the State's -- what is the 22 State's goal in using AWP's for reimbursement</p>	<p style="text-align: right;">Page 65</p> <p>1 amount per unit that we'll reimburse for -- for a 2 drug. 3 Q. Can you tell me just generally how the 4 State sets a MAC? 5 A. Generally when a -- generic equivalents 6 become available for a brand and we are made 7 aware of that, we'll -- we'll review the generic 8 products that are out there and try to obtain 9 from pharmacies what they say that they pay for 10 that product and then go from there to set the 11 MAC. 12 Q. As part of the MAC process, does 13 Arkansas compared -- compare the EAC of a drug 14 that might be MAC'd with the proposed MAC? 15 A. We will -- I -- we look at that, yes. 16 We'll look at what the brand EAC is versus the -- 17 the different generic prices. 18 Q. And what if when you do that 19 comparison, what if the brand EAC is lower than 20 the proposed MAC? What do you do then? 21 A. There wouldn't be a reason to set the 22 MAC.</p>

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<p style="text-align: right;">Page 242</p> <p>1 second full paragraph, OIG reports that it's  2 estimated that pharmacies pay an average of 42.5  3 percent less than AWP for drugs sold to the  4 Medicaid beneficiaries. Do you see that  5 language?  6 A. Yeah. I'm trying to read it, actually.  7 Q. Okay. Now, Arkansas never disputed the  8 findings of this report, correct?  9 MS. OBEREMBT: Objection.  10 A. This was just information. There was  11 nothing to respond to or comment on, to my  12 knowledge. I mean, this doesn't look like it's a  13 document to respond to. It just looks like it's  14 information.  15 Q. (By Mr. Reale) And it's information  16 that is available to Arkansas' Medicaid Program  17 to consider when it sets its reimbursement rates?  18 A. Again, it's information for us to -- to  19 be aware of.  20 Q. And the specific information in this  21 report is the level of discounts that were  22 available, on average, to pharmacies that</p>	<p style="text-align: right;">Page 244</p> <p>1 trying our best to reimburse closer to the  2 acquisition cost on a generic drug.  3 Q. (By Mr. Reale) How long has Arkansas'  4 Medicaid MAC Program been in place, the State  5 Upper Limit Program?  6 A. When I came onboard, there were State  7 MACs in place at that point in time.  8 Q. And you testified that the MAC prices  9 -- sorry. You state -- you testified earlier  10 that the MAC prices set by Arkansas' Medicaid  11 Program were based on actual acquisition cost to  12 pharmacies?  13 A. I never said that.  14 Q. Well, how is the MAC Program set up?  15 A. Again, the -- the MAC Program, we -- we  16 have an individual that currently does that for  17 us today. Basically, he will -- when we are aware  18 that there are some generics that have become  19 available for a brand, generic equivalents, he  20 will obtain -- he'll -- he'll find out from  21 different pharmacies. He'll call pharmacies who  22 -- who are willing to work with us, give us their</p>
<p style="text-align: right;">Page 243</p> <p>1 purchased generic drugs?  2 A. Are you asking me a question?  3 Q. Yes.  4 A. I'm sorry. I thought you were making a  5 statement.  6 Q. In the information in -- in this report  7 was the level of discounts that were available to  8 pharmacies that purchased generic drugs, correct?  9 A. This appears to be -- the statement we  10 read in the back referred to -- to generic drugs,  11 yes.  12 Q. And in 1997, all the way up to the  13 present, Arkansas' Medicaid department has never  14 adopted a reimbursement rate to reflect the  15 average discounts that were reported in 1997?  16 MS. MOSLEY-SIMS: Objection.  17 A. Again, although that may not have  18 changed, we -- we still have a State upper limit  19 that -- that would -- based -- based on any type  20 of information like this, that doesn't mean we're  21 not pursuing, because we -- when we're setting  22 State upper limits or our MACs, then we are</p>	<p style="text-align: right;">Page 245</p> <p>1 invoice price, what they pay for the drug.  2 We don't -- their invoice price. He'll  3 also get from them the different prices that they  4 pay for their generics and just kind of --  5 through some type of an analysis -- I don't know  6 the full detail of how he does it, but we'll  7 determine a MAC on -- on that generic -- on the  8 generic, on the GCN. Are you familiar with the  9 GCN?  10 Q. Yes. But why don't, for the record,  11 you say what that is?  12 A. The GCN is a single number that will  13 encompass multiple NDCs, so that rather than  14 having to apply something to each specific NDC,  15 it represents that specific drug, its dosage  16 form, its route of administration, so that you  17 don't have to be with a lot of numbers.  18 Q. So is -- is it fair to say that a MAC  19 price that's set for a generic drug is not based  20 on AWP?  21 A. It's not -- it doesn't reimburse off of  22 AWP. We might look at what the acquisition cost</p>

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<p style="text-align: right;">Page 246</p> <p>1 of that brand is.</p> <p>2 Q. Okay.</p> <p>3 A. Okay. We -- like if -- if you have a</p> <p>4 -- the easiest way for me to explain it, if you</p> <p>5 have a brand and you know that -- what we would</p> <p>6 reimburse based on our reimbursement formula, AWP</p> <p>7 minus 14 percent, then you -- he also finds out</p> <p>8 from the pharmacy what that actual cost of that</p> <p>9 brand is just as a comparison tool, so that when</p> <p>10 he is setting the MAC, he can make that -- make a</p> <p>11 comparable determination.</p> <p>12 Q. Is -- is the MAC based in part on the</p> <p>13 invoice price of generic drugs within the GCN?</p> <p>14 A. The MAC looks at what the pharmacies</p> <p>15 tell us are the invoice price for the different</p> <p>16 NDCs within that GCN. So he has a -- he'll</p> <p>17 determine -- he'll put them -- I'm not good at</p> <p>18 explaining how he does it. He puts them all on a</p> <p>19 spreadsheet. He develops a spreadsheet of all of</p> <p>20 the NDCs that he can obtain within that GCN and</p> <p>21 gets the invoice prices from the -- from the</p> <p>22 pharmacies.</p>	<p style="text-align: right;">Page 248</p> <p>1 saying we don't have a physical invoice to look</p> <p>2 at. We're calling them and we're -- we're</p> <p>3 putting our trust in them that they're giving us</p> <p>4 an honest number of what they pay for the drug.</p> <p>5 Q. (By Mr. Reale) And -- and the MAC price</p> <p>6 is below the AWP, correct?</p> <p>7 A. Yes.</p> <p>8 Q. And it's actually below the estimated</p> <p>9 acquisition cost, correct?</p> <p>10 A. Yeah. That's correct.</p> <p>11 Q. So the MAC price is not based on AWP?</p> <p>12 A. That's correct.</p> <p>13 Q. It's based on actual invoices that --</p> <p>14 A. It's based on what pharmacies say they</p> <p>15 have paid for the prescription.</p> <p>16 Q. How many drugs are subject to the MAC?</p> <p>17 A. I don't know. I don't know.</p> <p>18 Q. More than 1,000?</p> <p>19 A. That's a -- when you say actual drugs</p> <p>20 or GCNs, there's a big difference.</p> <p>21 Q. Well --</p> <p>22 A. And so I don't know how to answer that</p>
<p style="text-align: right;">Page 247</p> <p>1 Q. Right. And those invoice prices aren't</p> <p>2 AWP, but those are the invoice prices at which</p> <p>3 they actually pay the wholesale of the actual --</p> <p>4 A. That's the invoice price. The invoice</p> <p>5 price. We don't know in the -- you know, if</p> <p>6 there's other discounts involved in that at all.</p> <p>7 It's strictly the invoice price. What the</p> <p>8 pharmacy tells us. We don't actually see the</p> <p>9 invoice. He will call, and they will say this is</p> <p>10 what I pay. So it's at our best -- we're taking</p> <p>11 the pharmacy at their word for what they're</p> <p>12 saying they actually pay for -- for some</p> <p>13 products.</p> <p>14 Q. Do you have any reason to suspect that</p> <p>15 the pharmacies are giving you a fraudulent</p> <p>16 number?</p> <p>17 MS. OBEREMBT: Objection.</p> <p>18 A. Objection. Listen to me, objection.</p> <p>19 No, I'm going -- no, I don't suspect that they're</p> <p>20 giving us a fraudulent number. I mean, it's</p> <p>21 based on trust, so I definitely don't feel like</p> <p>22 they're giving us a fraudulent number. I'm just</p>	<p style="text-align: right;">Page 249</p> <p>1 question. There would have been --</p> <p>2 Q. How many GCNs are subject to the State</p> <p>3 MAC?</p> <p>4 A. I honestly -- I honestly do not know.</p> <p>5 I'd have to pull the upper limit list online and</p> <p>6 look to see which ones are Federal upper limits</p> <p>7 and which ones are State. I don't know.</p> <p>8 Q. Do you believe it's more than 500 that</p> <p>9 are subject to a State MAC?</p> <p>10 A. I don't know. I mean, there are --</p> <p>11 there are several, but I honestly cannot tell you</p> <p>12 how many. I've never just gone in to look to</p> <p>13 count. That's -- that's not part of what I do.</p> <p>14 That's not --</p> <p>15 Q. And I believe you testified it's an</p> <p>16 individual EDS that actually surveys the</p> <p>17 pharmacies to determine their acquisition --</p> <p>18 A. He's contracted to do that for us.</p> <p>19 That's just one of his job duties. He has</p> <p>20 several other job duties, but that's one of his.</p> <p>21 Q. But one of his job duties is dedicated</p> <p>22 solely to determining a MAC price?</p>

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<p style="text-align: right;">Page 298</p> <p>1 FUL price that had also been set, correct? For 2 drugs for which there was a FUL they were 3 purchased at rates on average of 45.9 percent of 4 the FUL? In other words, the FUL minus about 54 5 percent; isn't that correct? 6 A. I don't know. I'm trying to -- I'm 7 trying to make sure I'm -- I'm answering 8 correctly. It's just saying 45.9 percent of the 9 FUL. It's not saying what it is off of the AWP. 10 That's why I'm a little bit concerned. 11 Q. Oh, I'm sorry. I meant off the FUL. 12 So the FUL minus 54 percent. Let me -- let me 13 ask that again. If I was -- if I said that 14 incorrectly. 15 Even for drugs for which a FUL had been 16 set, the average acquisition cost for pharmacies 17 was at a level below the Federal upper limit; 18 isn't that correct? 19 A. That's what this is stating, that these 20 were -- that's what this is stating. 21 MR. REALE: I can only assume that 22 they're letting us out, right?</p>	<p style="text-align: right;">Page 300</p> <p>1 Q. Do you agree with that statement? 2 MS. MOSLEY-SIMS: Objection. 3 A. Do I agree with that statement? It 4 depends on in what way you mean I agree with that 5 statement. I think there should be several 6 factors as far as it relates to maintaining 7 access. 8 Q. (By Mr. Reale) Right. So one of the 9 factors that Arkansas must consider when it sets 10 the reimbursement rate is the need to maintain 11 sufficient access to services for Medicaid 12 recipients throughout the state; is that correct? 13 A. That's correct. 14 MS. FORD: Objection to form. 15 Q. (By Mr. Reale) And another factor that 16 Arkansas must consider are the politics and 17 provider relations; is that correct? 18 MS. MOSLEY-SIMS: Objection. 19 Q. (By Mr. Reale) Okay. So do you 20 remember the question? 21 A. Yes. I think I'm with you now. 22 Q. Okay. So another factor that Arkansas</p>
<p style="text-align: right;">Page 299</p> <p>1 VIDEOGRAPHER: Going off record at 4:19 2 p.m. ending Tape 6. 3 (Whereupon, a break was taken.) 4 (At this point in the proceedings, Ms. 5 Oberembt left the deposition. Rebecca Ford 6 entered the deposition telephonically.) 7 VIDEOGRAPHER: Back on record at 4:27 8 p.m. 9 Q. (By Mr. Reale) Continuing with Roxane 10 Exhibit 16, on Bates Page 6936, Myers and 11 Stauffer, excuse me, presents its conclusions. 12 Do you see that section of the report? 13 A. I'm sorry. I went ahead of you. 14 Q. And you can review that first paragraph 15 if you'd like. 16 A. I see it. 17 Q. Do you agree that there are several 18 factors that should be considered in determining 19 an appropriate Medicaid pharmacy reimbursement 20 formula, other than dispensing and drug 21 acquisition costs incurred by pharmacies? 22 A. I see that.</p>	<p style="text-align: right;">Page 301</p> <p>1 must consider when it sets its reimbursement rate 2 are politics. Do you agree with that? 3 A. I think that that's the -- the 4 consideration of politics and provider relations 5 are -- will also be involved, yes. I don't 6 disagree. 7 Q. And how have politics played a role in 8 Arkansas' setting of the reimbursement rate? 9 A. Well, I hate to use the word 10 "politics", but provider relations more than 11 anything. When we set the rate as we had talked 12 about earlier today at AWP minus 25 percent and 13 the pharmacy community was very vocal that they 14 felt that -- those that were vocal felt that 25 15 percent, they could not purchase all of their 16 generics at that price, so that -- and that 20 17 percent was a recommendation or a suggestion. 18 Q. Did pharmacies at that time tell you 19 that on average, they couldn't acquire their 20 multiple-source drugs at rates of AWP minus 25 21 percent? 22 A. Honestly, I don't remember the exact</p>

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